

# **In the Supreme Court of the State of Alaska**

**J.P. and S.P. (Foster Parents),**  
Appellants,

v.

**State of Alaska, DHSS, OCS, G.C.**  
**(Mother), W.F. (Father), J.F. (Child),**  
**and Sun'aq Tribe of Kodiak,**  
Appellees.

Supreme Court No. **S-18107**

## **Order**

Date of Order: **7/09/2021**

Trial Court Case No. **3AN-17-00032CN**

Before: Winfree, Maassen, Carney, and Borghesan, Justices [Bolger,  
Chief Justice, not participating.]

This appellate proceeding arises out of an underlying child-in-need-of-aid (CINA) case in the superior court that was transferred to the jurisdiction of Sun'aq Tribe of Kodiak. J.P. and S.P., foster parents of the child at the center of this matter, have filed an appeal of (1) the superior court's motion transferring jurisdiction of the CINA case to the Sun'aq Tribal Court and (2) the order of the Sun'aq Tribal Court dated 6/16/21 affirming that court's prior placement order of 6/9/21. J.P. and S.P. filed two motions for stay of proceedings pending appeal: the first on 6/11/21, and the second on 6/16/21. This court promptly denied both motions for stay, stating that an explanation would follow at a later date. This order explains the court's reasoning for denying these motions.

According to the pleadings filed with this court, the four-year-old child in question has lived with foster parents J.P. and S.P. for most of his life, during which a CINA case was pending in superior court. Earlier this year, the Sun'aq Tribe of Kodiak moved to transfer the case to its tribal court (the Sun'aq Tribe is not the child's or

father's tribe, but according to the Sun'aq Tribal Court's placement order the father's tribe "passed a resolution . . . to designate the case to the Sun'aq Tribal Court"). The superior court granted the motion to transfer jurisdiction pursuant to 25 U.S.C. § 1911(b) on 5/26/21, stating that the transfer would be effective upon the tribal court filing notice of acceptance. J.P and S.P moved to stay the superior court's order and then moved for reconsideration; OCS and the GAL joined these motions. The Sun'aq Tribe filed notice of acceptance of jurisdiction on 6/4/21 and then held a custody hearing in its tribal court on 6/9/21. The tribal court ordered the child placed with paternal relatives in New Mexico and ordered J.P. and S.P. to deliver the child the next day (6/10/21), with the transfer to take place at the Anchorage Police Department.

On 6/11/21 the superior court denied J.P. and S.P.'s motion for stay and reconsideration. The superior court reasoned that it no longer had subject matter jurisdiction to override the tribal court's rulings. It reasoned that "The Tribal Court's decision, however, is subject to review by the Alaska Supreme Court" and indicated that J.P. and S.P. could request a stay pending appeal from this court. In a supplemental order on the same date, the superior court addressed the foster parents' arguments about the merits of the tribal court's decision, stating: "So long as the Tribal Court's decision comports with due process, and no evidence to the contrary has been shown in this case, the Tribal Court's decisions . . . must be respected." The superior court reiterated that "any challenge to the Tribal Court's decision should be brought before the Alaska Supreme Court."

Later that day J.P. and S.P. filed a motion for stay pending appeal in this court. The motion sought to prevent enforcement of the tribal court's order placing the

child with extended family in New Mexico. J.P. and S.P. argued that the tribal court's placement hearing did not afford due process and that the rapid change in placement would be harmful to the child. We denied this order the same day.

The next week, the Sun'aq Tribal Court held a new hearing on 6/16/21, to which it invited J.P. and S.P. to testify, and they did so. At the close of this hearing, the tribal court affirmed its previous placement order of 6/9/21 and ordered J.P. and S.P. to relinquish the child. They did so, and the child was set to travel to New Mexico with his paternal relatives late that evening.

Later on 6/16/21, J.P. and S.P. filed a new motion for stay in this court and lodged appeal paperwork. Their notice of appeal makes clear that they are seeking to appeal both the superior court's order transferring jurisdiction to the tribal court and the tribal court's placement orders. The motion for stay again argued that the tribal court hearing failed to afford due process, that the outcome was predetermined, and that the tribal court's placement order would be harmful to the child. J.P. and S.P. requested an immediate stay to prevent the child from being taken to New Mexico that evening. We denied this motion on 6/17/21.

A request for stay pending appeal is governed by the same standards that apply to a motion for preliminary injunction.<sup>1</sup> The right to a preliminary injunction is governed by two distinct tests: the balance-of-hardships test and the probable-success-on-the-merits test. For the former test to apply: "(1) the plaintiff must be faced with irreparable harm; (2) the opposing party must be adequately protected; and (3) the

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<sup>1</sup> *Powell v. City of Anchorage*, 536 P.2d 1228, 1229 (Alaska 1973).

plaintiff must raise serious and substantial questions going to the merits of the case; that is, the issues raised cannot be frivolous or obviously without merit.”<sup>2</sup> “Where the injury which will result from the temporary restraining order or the preliminary injunction is not inconsiderable and may not be adequately indemnified by a bond, a showing of probable success on the merits is required.”<sup>3</sup>

J.P. and S.P. cannot make the necessary showing on the merits even under the balance-of-hardships test because their appeal rests on a flawed legal and jurisdictional foundation.<sup>4</sup> To begin, their appeal of the superior court’s order transferring jurisdiction is moot. By the time they appealed on 6/11/21, jurisdiction had already passed to the tribal court. Even if we were to rule that the superior court erred in transferring jurisdiction, neither this court nor the superior court has authority to order the tribal court — the court of a separate sovereign, the Sun’aq Tribe of Kodiak — to transfer jurisdiction of the child’s proceeding back to state court.<sup>5</sup> So there is no way to

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<sup>2</sup> *Alsworth v. Seybert*, 323 P.3d 47, 54 (Alaska 2014).

<sup>3</sup> *Id.* at 54-55.

<sup>4</sup> We observe that there is no indication that J.P. and S.P. were parties to the underlying CINA proceeding in superior court and therefore have a right to appeal. *See* Alaska R. App. P. 204(g) (“All parties to the trial court proceeding when the final order or judgment was entered are parties to the appeal.”). Although we have recently ruled that the superior court may permit foster parents to intervene as parties in a CINA case, *State, Dept. of Health & Social Servs., Office of Children’s Servs., v. Zander B.*, 474 P.3d 1153 (Alaska 2020), J.P. and S.P. have not presented documents showing that they were granted party status here.

<sup>5</sup> *See In re M.M.*, 154 Cal. App. 4th 897, 913 (2007) (“The case has been  
(continued...)”)

correct any error that will afford J.P. and S.P. tangible relief.<sup>6</sup>

For the same reason, this court cannot directly review the placement order of the Sun’aq Tribal Court. “Because the [Sun’Aq Tribe] is a separate sovereign, we could no more compel its courts to comply with our order than we could compel the courts of a foreign state or nation to do so.”<sup>7</sup> We have no appellate jurisdiction to directly review orders of the Sun’aq Tribal Court, even to correct asserted errors of due process. It is possible for a person to challenge enforcement of a tribal court order by showing that it should be denied full faith and credit. A tribal court order will be denied full faith and credit if the court failed to render its judgment in accordance with minimum due process.<sup>8</sup> Although J.P. and S.P. argued below (in their post-transfer motions for

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<sup>5</sup> (...continued)

transferred to the Karuk Tribal Court, which has exercised its jurisdiction and declared Minor a ward of that court. Even if we were to reverse, neither the juvenile court nor this court has the power to command the courts of a wholly separate sovereign to return the case to us.”).

<sup>6</sup> For this reason, it would behoove the superior court in the future to fashion any order transferring jurisdiction to tribal court in a way that does not take immediate or near-immediate effect, so as not to prejudice the ability of parties who may have objected to the transfer to seek a stay and appellate relief from this court.

<sup>7</sup> *In re M.M.*, 154 Cal. App. 4th at 913.

<sup>8</sup> *See Simmonds v. Parks*, 329 P.3d 995, 1011 (Alaska 2014) (noting that tribal court order will be denied full faith and credit if the tribal court failed to render its judgment in accordance with minimum due process).

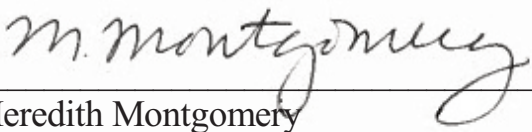
To state a due process claim, one must first identify the protected liberty interest that is being deprived. It is an open question whether foster parents, whose  
(continued...)

stay and reconsideration) that the tribal court did not afford them due process, they did not expressly seek to deny enforcement of the tribal court order on the grounds that it cannot be given full faith and credit, and consequently the superior court did not make specific findings necessary to decide that issue. Thus the question of whether the tribal court's placement orders should be denied full faith and credit is not properly before this court at this time.

For these reasons, we cannot say that J.P. and S.P. present serious and substantial questions on the merits of their appeal. Therefore, their motions for stay pending appeal were denied. That is not to diminish the noble service J.P. and S.P. have given in caring for this child in need for virtually all of his life, their concern for his wellbeing, or their understandable sorrow at the change in placement. It is rather a reflection of strong policies enshrined in the Indian Child Welfare Act of giving Indian Tribes authority over child welfare proceedings involving Indian children and Tribes' status as separate sovereigns.

Entered at the direction of the court.

Clerk of the Appellate Courts

  
Meredith Montgomery

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